No. 90-1414

Supreme Court, U.S.
FILED
MAR 8 1991
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In The

Supreme Court of the United States

October Term, 1990

STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS,

Petitioner,

-vs-

U.S. SECRETARY OF AGRICULTURE; ADMINISTRATOR OF THE AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE; JAMES M. DAVIS, ASSISTANT DEPUTY ADMINISTRATOR OF THE AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE; THOMAS A. VANGARLEM, ASSISTANT DEPUTY ADMINISTRATOR OF THE AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March, 1991

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QUESTIONS PRESENTED

The United States Secretary of Agriculture denied North Dakota's application to enroll land into the conservation reserve program. The Eighth Circuit Court of Appeals denied review, finding the governing statute, 16 U.S.C. § 3835, without judicial standards to evaluate North Dakota's claim that the Secretary's decision was an abuse of discretion. In doing so, the court adopted the strict interpretation of the law of reviewability as applied by some circuits, and rejected the flexible, pragmatic interpretation of the law of reviewability as applied by other circuits. The pragmatic interpretation allows consideration of policy reasons for determining reviewability and nonreviewability. The questions presented are:

I.

Whether the Court of Appeals, in ruling that it could not review North Dakota's claim that the Secretary of Agriculture abused his discretion in denying North Dakota's application to enroll land in the conservation reserve program, erred in applying the strict interpretation of the law of reviewability, rather than the pragmatic interpretation?

II.

Whether the Secretary of Agriculture has absolute discretion under 16 U.S.C. § 3835(a)(1)(C) to decide whether or not adequate assurances exist to waive the three-year ownership rule for entry into the conservation reserve program?

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OPINIONS BELOW

The majority opinion of the Eighth Circuit Court of Appeals and the related dissenting opinion are as yet unreported and appear at Appendix C. The opinion of the District Court is reported at 711 F. Supp. 517 (D.N.D. 1989), and appears at Appendix D.

JURISDICTION

Judgment of the Court of Appeals was entered on September 12, 1990. Appendix A. A timely petition for rehearing was filed on September 25, 1990. The petition was denied on December 11, 1990, though four judges voted to rehear the case en banc. Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Two statutory provisions are involved in this case. The first is 5 U.S.C. § 701(a) of the Administrative Procedure Act, which states:

> This chapter applies, according to the provisions thereof, except to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.

The second statutory provision involved is 16 U.S.C. § 3835(a)(1), which states:

> (1) No contract shall be entered into under this subchapter concerning land with respect to which the ownership has changed in the 3-year period preceding the first year of the contract period unless –
>
> > (A) the new ownership was acquired by will or succession as a result of the death of the previous owner;
> >
> > (B) the new ownership was acquired before January 1, 1985;
> >
> > (C) the Secretary determines that the land was acquired under circumstances that give adequate assurance that such land was

> not acquired for the purpose of placing it in the program established by this subchapter; or
>
> (D) the ownership change occurred due to foreclosure on the land and the owner of the land immediately before the foreclosure exercises a right of redemption from the mortgage holder in accordance with State law.

STATEMENT OF THE CASE

This case involves two tracts of state-owned land that the Secretary of Agriculture refused to enroll in the conservation reserve program (CRP). The primary purpose of the CRP is to conserve highly erodible cropland. 7 C.F.R. § 704.1 (1990). It allows owners of such land to enter into long-term contracts with the Secretary of Agriculture requiring that the land be seeded to grass or other cover to stabilize the topsoil. In exchange for removing the land from agricultural use, the landowner receives annual payments from the Secretary.

An eligibility requirement for participation in the CRP is that the land must not have changed ownership in the three years prior to the start of the contract. 16 U.S.C. § 3835(a)(1). North Dakota acquired title to the tracts at issue less than three years before applying to enter the program. The reason for the three-year ownership rule is to prevent speculators from buying marginal land for the purpose of placing it into the program. There are, however, exceptions to the rule. One applies if "the Secretary determines that the land was acquired under circumstances that give adequate assurance that such land was

not acquired for the purpose of placing it in the program." 16 U.S.C. § 3835(a)(1)(C). North Dakota requested that the three-year ownership rule be waived under this exception.

In 1978 North Dakota loaned $62,000 to Melvin and Sharon Klimpel and $150,000 to Sigurd and Delores Haugland. The Klimpel loan was secured by a mortgage on a 314.9 acre tract of land in McHenry County and the Haugland loan was secured by a mortgage on a 101.8 acre tract of land in Eddy County.

The Klimpels and Hauglands soon failed to make their loan payments and by 1986 the Klimpels were over four years delinquent and the Hauglands over five years delinquent. In July of 1986 the state decided to foreclose on each tract. At the time of foreclosure the Klimpels owed $82,000 and Hauglands $210,000. The foreclosures went forward, the Klimpels and Hauglands failed to redeem, and in November of 1987 the State was issued a sheriff's deed to the McHenry County and Eddy County properties.

On February 10, 1988, the North Dakota Board of University and School Lands, as manager of the land, sought to place the tracts into the CRP. It applied to the McHenry County and Eddy County Agricultural Stabilization and Conservation Service (ASCS) Committees. The McHenry County Committee ignored the possibility of an exception to the three-year ownership rule and, in its decision, stated that "the State Land Department is not an eligible producer since they have not owned the land for three years." The Eddy County Committee also denied North Dakota's application, stating: "[W]e have

established that *any land* purchased after October 1, 1985, may have been acquired under circumstances that cannot give adequate assurance that the land was not acquired for the purpose of placing it in CRP." (Emphasis supplied.) The committee went on to note that North Dakota obtained title to the land in November of 1987 and on that basis alone concluded North Dakota was "not eligible to participate in CRP until the land has been owned for three years."

The State appealed the county decisions to the ASCS's state executive director, who summarily affirmed the Eddy County decision. Regarding the McHenry County decision, the executive director stated "that the State Land Department acquired this land in November, 1987," and then went on to state that the three-year ownership requirement had not been met, ignoring North Dakota's request to apply the "adequate assurance" exception.

North Dakota then appealed to the Secretary of Agriculture. In his decision regarding the McHenry County tract, the Secretary noted that the CRP began on October 1, 1985, and then ruled:

> Therefore, we have determined that in order to achieve the program goals and to eliminate any risk of discrediting the CRP, *land acquired after October 1, 1985, is considered ineligible until it has been owned for 3 years* and all other eligibility requirements are met. *Exemptions for land acquisitions made beyond this date cannot be justified.* We affirm the state committee's determination and deny your appeal.

(Emphasis supplied.) Thus, the Secretary ruled that the three-year ownership rule is absolute and declined to

consider the possibility that North Dakota satisfied the "adequate assurance" exception, an exception provided for by Congress to ease the rigor of the three-year ownership rule.

Regarding the Eddy County tract, the Secretary, although making a finding of fact that the State "took all reasonable steps to avoid the acquisition of the property," and acquired title "through an involuntary conveyance as a result of a default," nonetheless concluded there was not "adequate assurance" that the land was not acquired for the purposes of placing it in CRP. Thus, the Secretary ignored his own finding that North Dakota sought to avoid taking title to the property and followed an absolute rule denying any exception to the three-year rule.

Having exhausted its administrative remedies, North Dakota filed complaints in district court asking that the court find the Secretary's decisions arbitrary, capricious, an abuse of discretion, and not otherwise in accordance with law. The court was also asked to order the Secretary to enroll the land in the CRP. The cases were consolidated and the court's jurisdiction was based on 28 U.S.C. §§ 1331, 1361.

The district court concluded that the Secretary's decisions were arbitrary, capricious, and an abuse of discretion. *North Dakota ex rel. Bd. of Univ. & School Lands v. Yeutter, et al.*, 711 F. Supp. 517, 521 (D.N.D. 1989). It also concluded that the decisions were discretionary and, therefore, nonreviewable. *Id.* at 520-21. The court, however, did find that the Secretary is obligated to promulgate standards to guide his decisions in this area and

remanded the case for adoption of administrative rules. *Id.* at 521. The Secretary appealed the finding of an abuse of discretion and the decision of remand. The State cross-appealed, challenging the finding that the Secretary's decisions are nonreviewable. The appeals were pursuant to 28 U.S.C. § 1291.

A divided panel of the Court of Appeals concluded that 5 U.S.C. § 701(a)(2), which disallows judicial review of agency actions to the extent they are "committed to agency discretion by law," precludes review. In particular, the court found that 16 U.S.C. § 3835(a)(1)(C) gives the Secretary broad discretion and does not contain meaningful standards for a court to determine whether or not the Secretary abused his discretion in failing to find North Dakota satisfied the "adequate assurance" exception to the three-year rule.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with a strong and steady judicial tradition of reviewability.

American jurisprudence has always recognized the value of judicial review of executive action. It is a vital part of the separation of powers within our government. In *Marbury v. Madison*, 1 Cranch 137, 163, 2 L. Ed. 60 (1803), Chief Justice Marshall stated that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws."

As recently as 1986 a unanimous Court summarized and affirmed the judicial tradition of reviewability. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667,

670-72 (1986). "We begin with a strong presumption that Congress intends judicial review of administrative action." *Id.* at 670. The Court stated that "[f]rom the beginning" its decisions establish that judicial review of administrative decisions will only be cut off if there is persuasive reason to believe that is the intent of Congress. *Id.* The Court also relied on "a wealth of scholarly literature," *id.* at 672 n.3, and such Congressional sources as a report of the Senate Committee on the Judiciary that stated it has never been the policy of Congress to pre ent judicial oversight of administrative action, were it otherwise, " 'statutes would in effect be blank checks drawn to the credit of some administrative officer or board.' " *Id.* at 671 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). The Court ended its summary of the law of reviewability by noting that it is a "heavy burden" to overcome the "strong presumption" of reviewability and that Congress's intent to do so must be shown by "clear and convincing evidence." *Id.* at 671-72 (citing *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)).

At stake in this case is an important question, that is, the jurisdiction of federal courts. The role of federal agencies in the lives of individuals and in the affairs of political subdivisions and the states is ubiquitous and growing. This is particularly true in the western states where the federal government owns immense land areas. A writ should issue so that the Court can decide whether the decision below conforms with the rich tradition of reviewability.

2. The decision below conflicts with the decisions of other circuits, with other decisions within the Eighth Circuit itself, and even with decisions of the Supreme Court.

The Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06, affirms the role of judicial review in our system of checks and balances. A person adversely affected by agency action "is entitled to judicial review." 5 U.S.C. § 702. If the agency action is arbitrary, capricious, or an abuse of discretion, the reviewing court "shall" hold it unlawful. 5 U.S.C. § 706(2)(A).

The APA's provisions for reviewability, however, do not apply "to the extent that . . . agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). If taken literally, this exception to reviewability "would swallow a much larger portion of the general rule of reviewability than Congress could have intended, particularly in light of 5 U.S.C. § 706(2)(A)." *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 302 (2d Cir. 1971). Before the Supreme Court addressed the issue, this tension within the APA was resolved by the lower courts "through a balancing test that called for weighing policy reasons for and against judicial review." Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 703 (1990). *See, e.g., Hahn v. Gottlieb*, 430 F.2d 1243, 1244-50 (1st Cir. 1970).

The Supreme Court's first discussion of this tension within the APA was in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The plaintiff challenged the Secretary of Interior's decision approving a highway route that would run through a public park. *Id.* at 406. In

deciding whether the plaintiff was entitled to judicial review, the Court stated:

> Similarly, the Secretary's decision here does not fall within the exception for action "committed to agency discretion." This is a very narrow exception. . . . The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."

Id. at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). This was the Court's entire analysis of Section 701(a)(2).

The lower courts found the *Overton Park* analysis unsatisfactory. "[Q]uestions abound as to the proper interpretation of this holding." *Dugan v. Ramsay*, 560 F. Supp. 1230, 1235 (D.R.I. 1983), *rev'd on other grounds*, 727 F.2d 192 (1st Cir. 1984). *See also Alan Guttmacher Inst. v. McPherson*, 597 F. Supp. 1530, 1534 (S.D.N.Y. 1984), *modified on other grounds*, 805 F.2d 1088 (2d Cir. 1986) ("Courts have struggled to find the balance which Congress presumably intended"); *Cardoza v. Commodity Futures Trading Comm'n*, 768 F.2d 1542, 1548 (7th Cir. 1985) (determining what agency action is committed to discretion by law under § 701(a)(2) is a "troublesome question"); *New York Racing Ass'n, Inc. v. Nat'l Labor Relations Bd.*, 708 F.2d 46, 50 (2d Cir.), *cert. denied*, 464 U.S. 914 (1983) (Section 701(a)(2) "has generated disagreement in the courts . . . and fierce debate in the law reviews," and noting that the Second Circuit itself has "wrestled with the difficulty" in distinguishing between reviewable and unreviewable discretionary decisions).

Not only did the lower courts find *Overton Park's* "no law to apply" test troublesome, they also issued conflicting opinions. Some courts adopted a flexible, interest-balancing test that has became known as the pragmatic approach. In effect, this approach continued the pre-*Overton Park* law. *See* Levin, *supra* p. 9, at 744. Other courts applied a strict interpretation of the "no law to apply" test, requiring that the governing statute contain standards to guide judicial review.

The clearest application of the pragmatic approach is by the D.C. Circuit Court of Appeals. In *Natural Resources Defense Council, Inc. v. Sec. & Exch. Comm'n*, 606 F.2d 1031, 1043 (D.C. Cir. 1979), the court stated: "In practice, the determination of whether there is 'law' to apply necessarily turns on pragmatic considerations as to whether an agency determination is the proper subject of judicial review." In making this determination, the court stated it must "evaluate the relevance of three particularly important factors: the need for judicial supervision to safeguard the interests of the plaintiffs; the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and the appropriateness of the issues raised for judicial review." *Id.* at 1044. *See also Investment Co. Inst. v. Fed. Deposit Ins. Corp.*, 728 F.2d 518, 526 (D.C. Cir. 1984).

Decisions from the Sixth and Fourth Circuits express approval of the D.C. Circuit's pragmatic considerations approach. *Gillis v. United States Dep't of Health & Human Servs.*, 759 F.2d 565, 576 (6th Cir. 1985); *Sinai Hosp. of Baltimore, Inc. v. Horvitz*, 621 F.2d 1267, 1270 (4th Cir. 1980). The Eighth Circuit Court of Appeals adopted its own pragmatic interpretation of the "no law to apply"

test. In *Tuepker v. Farmers Home Admin.*, 708 F.2d 1329, 1332 (8th Cir. 1983), the court, after approving the D.C. Circuit's rule that pragmatic considerations determine reviewability, stated that whether or not there is "law to apply" within the meaning of *Overton Park* requires a determination of "(1) whether the challenged agency action is of the type Congress intended to be left to a reasonable exercise of agency discretion; and (2) whether the problem raised is one suitable for judicial determination." A few years later a panel of the Eighth Circuit, in dicta, stated that while the pragmatic approach has less force than it once did, it is still applicable. *Woodsmall v. Lyng*, 816 F.2d 1241, 1245 (8th Cir. 1987). In the decision below, however, the panel rejected the pragmatic approach.

The Seventh Circuit can also be counted among the Courts of Appeal accepting a practical understanding of the "no law to apply" test. In *Cardoza v. Commodity Futures Trading Comm'n*, 768 F.2d 1542, 1549 (7th Cir. 1985), the court stated that "§ 701(a)(2) applies in certain circumstances where courts are unqualified to decide whether an agency has abused its discretion."

In summary, the D.C. Circuit adopted the pragmatic considerations approach. In the Eighth Circuit, two panels recognized it while one panel rejected it. At least two other circuits, the Sixth and Fourth, have noted their approval of the pragmatic approach and the Seventh Circuit's interpretation of Section 701(a)(2) is guided by practical considerations, that is, the statute's limitation on review only applies where the judiciary is "unqualified" to review the agency action.

But the flexible approach is not unanimous. Other circuits strictly interpret the "no law to apply" test. This approach requires that the governing statute contain specific standards to guide judicial evaluation of the agency's discretion. If the statute is without such standards, there is no review.

Decisions of the Ninth Circuit adopt the literal interpretation. For example, in *Nelson v. Andrus*, 591 F.2d 1265 (9th Cir. 1978), the court considered whether it could review the Secretary of Interior's decision classifying certain land as suitable for entry under the Desert Land Act. The court denied review, stating: " 'There is 'law to apply,' only if a specific statute limits the agency's discretion to act in the manner which is challenged.' " *Id.* at 1266 (quoting *City of Santa Clara v. Andrus*, 572 F.2d 660, 666 (9th Cir.), *cert. denied*, 439 U.S. 859 (1978)). *See also Arizona Power Auth. v. Morton*, 549 F.2d 1231, 1240 (9th Cir.), *cert. denied*, 434 U.S. 835 (1977) (the issue "is whether Congress has provided a legal standard that we may apply in reviewing the Secretary's [decision]").

Decisions from the Second and Eleventh Circuits also strictly interpret the "no law to apply" test and decline to weigh policy considerations for and against judicial review. *Florida v. United States Dep't of Interior*, 768 F.2d 1248, 1255-56 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) (looking only to the governing statute to determine whether an agency decision is subject to judicial review); *Greater New York Hosp. Ass'n v. Matthews*, 536 F.2d 494, 497-98 (2d Cir. 1976) (same).

Thus, in the years following *Overton Park* the Courts of Appeal wrestled with the meaning of the "no law to apply" test. By 1985, when the Supreme Court again

considered the subject, the case law on the subject was "split badly." Levin, *supra* p. 9, at 711. The 1985 decision was *Heckler v. Chaney*, 470 U.S. 821 (1985). In *Chaney* a group of convicts sentenced to death by injection of drugs asked the Food and Drug Administration (FDA) to take enforcement action to prevent use of the drugs. *Id.* at 823. They claimed the use of lethal drug injections as a means of capital punishment violated a federal law. *Id.* When the FDA refused to bring an action against state authorities using the drugs, the convicts sought judicial review. *Id.* at 825.

The case differs from most administrative cases. An agency's refusal to bring enforcement proceedings is "presumptively unreviewable." *Id.* at 832. The typical agency action is, on the other hand, subject to a "strong presumption" of reviewability. *See, e.g., Dunlop v. Bachowski*, 421 U.S. at 567. The *Chaney* Court noted that the presumption of nonreviewability could be rebutted if Congress furnished "law to apply" in the form of substantive guidelines circumscribing an agency's enforcement discretion. *Id.* at 832-35. The Court also quoted extensively from *Overton Park* and explained that under Section 701(a)(2)

> review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion . . . . This construction avoids conflict with the 'abuse of discretion' standard of review in § 706 – if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'

Id. at 830.

Chaney, however, did not clarify the "no law to apply" test and thereby resolve the split among the circuits. Some authorities believe *Chaney* rejected the pragmatic approach. *See, e.g., California Human Dev. Corp. v. Brock*, 762 F.2d 1044, 1052 (D.C. Cir. 1985) (Scalia, J., concurring). But because *Chaney* did not directly use the "no law to apply" standard to resolve the case, *Woodsmall v. Lyng*, 816 F.2d at 1244, and because *Chaney* said nothing directly about the pragmatic approach, other authorities believe *Chaney* did not reject the approach. *Cardoza v. Commodity Futures Trading Comm'n*, 768 F.2d 1542, 1549 (7th Cir. 1985) (*Chaney* reaffirms that "§ 701(a)(2) applies in certain circumstances where courts are unqualified to decide whether an agency has abused its discretion"). In *Robbins v. Reagan*, 780 F.2d 37, 46-47 (D.C. Cir. 1985), the court noted that *Chaney* dealt with a unique case, that is, the reviewability of an agency's refusal to take action, and since such decisions are not presumptively reviewable, *Chaney* must not be applied outside of that context. Indeed, the *Chaney* Court stated the "case turns on" the presumption of nonreviewability. *Heckler v. Chaney*, 470 U.S. at 828.

The likely reason *Chaney* received conflicting interpretations is that although it referred to *Overton Park*'s "no law to apply" test, the Court applied practical considerations demonstrating the "general unsuitability for judicial review of agency decisions to refuse enforcement." *Heckler v. Chaney*, 470 U.S. at 831. Such a discussion was, in effect, an application of the pragmatic approach. One of the practical arguments made by the Court was that when an agency decides which alleged

law violations to investigate, it must consider many variables, such as its chance of prevailing, its overall regulatory priorities, and competing uses for its limited budget and personnel. *Id.* at 831. Courts are not the best forums to supervise managerial decisions about the use of scarce resources. *Id.* at 831-32.

The most recent discussion of Section 701(a)(2) by the Supreme Court is in *Webster v. Doe*, 486 U.S. 592 (1988). The director of the CIA dismissed Doe because of Doe's homosexuality. The dismissal was pursuant to a section of the National Security Act. 50 U.S.C. § 403(c).

The Court rejected the government's argument that Doe's constitutional claims were not subject to judicial review. *Webster v. Doe*, 486 U.S. at 603-04. The Court, however, ruled that Doe's other arguments were not, in light of Section 701(a)(2) and the "no law to apply" reasoning of *Overton Park* and *Chaney*, subject to review because the National Security Act "exudes deference" to the director and is without any meaningful judicial standard of review. *Id.* at 600-01.

This, however, did not end the Court's analysis. As with *Chaney*, it weighed policy and practical considerations for determining reviewability. The Court did not want the CIA director subject to a cross-examination of his views on national security. *Id.* at 600. The Court also discussed the "overall structure" of the National Security Act and stressed the director's need to trust subordinates and duty to protect intelligence sources. *Id.* at 600-01.

While *Chaney* and *Webster* reasserted the "no law to apply" barrier to judicial review, each decision also analyzed practical factors to decide whether or not the

agency actions were reviewable. Neither decision, however, expressly stated that the pragmatic approach is a proper or improper application of the "no law to apply" test. Thus, the extent of the federal judiciary's jurisdiction to review discretionary agency actions remains unresolved.

In summary, the lower courts have found the Supreme Court's analysis of reviewability and its resolution of the tension in the APA between Section 706(2)(A)'s demand for the review of discretionary decisions and Section 701(a)(2)'s limit on that review, unsatisfactory. Consequently, they have split in their interpretation of *Overton Park's* "no law to apply" test. Some believe a pragmatic, interest-balancing test is to be applied. Others believe reviewability requires that clear standards appear in the governing statute to guide judicial review. Resolution of these differing views is needed. Not only does the conflict exist between the circuits, it is also present within certain circuits. For example, in 1983 a panel of the Eighth Circuit adopted the pragmatic approach, *Tuepker v. Farmers Home Admin.*, 708 F.2d at 1332; in 1987 a panel, in dicta and relying on *Chaney*, limited but did not reject the pragmatic approach, *Woodsmall v. Lyng*, 816 F.2d at 1245; and in the decision below a panel did reject it. That decision, however, was by a divided panel and four judges voted to rehear it en banc. Professor Kenneth Davis's review of cases from the Second Circuit Court of Appeals also revealed disparate interpretations of the "no law to apply" test. 5 K. Davis, *Administrative Law Treatise*, 302-03 (2d ed. 1984).

The decision below is also in conflict with the *Chaney* and *Webster* decisions which relied in part on policy

considerations to decide reviewability. Partly because of these various conflicts, commentators believe a reexamination of the *Overton Park* "no law to apply" analysis is needed and that the present law of reviewability is too restrictive. *E.g.*, K. Davis, *Administrative Law of the Eighties: 1989 Supplement to Administrative Law Treatise*, 483-84 (1989). *See also* Saferstein, *Nonreviewability: A Functional Analysis of 'Committed to Agency Discretion,'* 82 Harv. L. Rev. 367, 397-98 (1968).

3. The decision below conflicts with a number of courts that have found the term "adequate assurance" and similar terms a sufficient judicial standard to allow and guide review.

The court, in the decision below, after rejecting the pragmatic considerations approach, examined the governing statute to determine whether it provided a standard to review the Secretary of Agriculture's decisions. The statute, 16 U.S.C. § 3835(a)(1)(C), states that the Secretary may waive the three-year ownership rule if he determines there is "adequate assurance" the applicant did not purchase the land for the purpose of placing it in the CRP. The court ruled that the term "adequate assurance" does not provide enough law to allow review.

This decision conflicts with the courts that have ruled that similar language does indeed provide "law to apply." In *Johnston v. Davis*, 698 F.2d 1088 (10th Cir. 1983), the court considered whether an environmental impact statement (EIS) complied with the National Environmental Policy Act. Part of the EIS contained an economic analysis of the project. The discount rate used in this analysis was

in a statute that contained the term "satisfactory assurances." 42 U.S.C. § 1962d-17(b). While acknowledging that the term was vague, the court decided that "satisfactory assurances" was enough to provide "law to apply" under *Overton Park*. The court relied on three other judicial decisions, all of which held that "satisfactory assurances" provides enough law to allow judicial review. *Id.* at 1093 (citing *Concerned Residents of Buck Hill Falls v. Grant*, 537 F.2d 29, 35-36 (3d Cir. 1976); *Burkey v. Ellis*, 483 F. Supp. 897, 907-08 (D. Ala. 1979); *Alabama ex rel. Baxley v. Corps of Engineers*, 411 F. Supp. 1261, 1271-72 (D. Ala. 1976)). The court also relied upon *Envtl. Defense Fund v. Marsh*, 651 F.2d 983, 1002-03 (5th Cir. 1981), in which the court found an administrative regulation with the term "satisfactory assurances" sufficient law to allow review.

The term "adequate assurance" appears in the Bankruptcy Code. Under 11 U.S.C. § 365(b)(1)(C) a bankruptcy trustee may assume a debtor's executory contract and unexpired lease provided the trustee, among other things, gives "adequate assurance of future performance under such contract or lease." Under 11 U.S.C. § 366(b), a utility may discontinue service to a debtor unless it is furnished "adequate assurance of payment." Bankruptcy courts have had no difficulty in deciding whether or not "adequate assurances" are met under these statutes. *In re Nat'l Shoes, Inc.*, 20 Bankr. 51, 59 (S.D. N.Y. 1982); *Hennen v. Dayton Power & Light Co.*, 17 Bankr. 720, 724-25 (S.D. Ohio 1982); *In re Luce Indus., Inc.*, 14 Bankr. 529, 531 (S.D.N.Y. 1981).

The term "adequate assurance" also appears in § 2-609(1) of the Uniform Commercial Code (UCC). The section allows a party to a contract to receive "adequate

assurance of due performance" when grounds for insecurity exist with respect to the performance of the other party. As with "adequate assurance" in the Bankruptcy Code, courts interpreting the term in the UCC have not fretted over determining what constitutes "adequate assurance." *AMF, Inc. v. McDonalds Corp.*, 536 F.2d 1167, 1171 (7th Cir. 1976); *Kunian v. Dev. Corp. of Am.*, 334 A.2d 427, 433 (Conn. 1973).

Consequently, as with the broader issue of the reviewability of discretionary actions, the courts have split in their opinion of what provides a meaningful standard to judge an exercise of discretion.

CONCLUSION

For the reasons presented above, North Dakota asks that the petition be granted.

Respectfully submitted,

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March, 1991

APPENDIX A

JUDGMENT

(Filed Jan 4, 1991)

These appeals from the United States District Court were submitted on the record of the district court, briefs of the parties and were argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause is affirmed in part and reversed in part in accordance with the opinion of this Court.

September 12, 1990

"Let the within Mandate be filed and entered on the Clerk's Records."

Dated: 1-4-91 /s/ Patrick A Conmy
PATRICK A. CONMY, CHIEF JUDGE
UNITED STATES DISTRICT COURT

NOTICE OF ENTRY

Take notice that the original of this copy was entered in the office of the clerk of the United States District Court for the District of North Dakota on the 4 day of January 1991.

EDWARD J. KLECKER, CLERK

By: /s/ Deborah Thomson
Deputy

A true copy.

ATTEST: /s/ Robert D. St. Vrain

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT
MANDATE ISSUED: 12/28/90

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-5485 & 89-5497ND

State of North Dakota, etc., Appellee, v. Clayton K. Yeutter, etc., et al., Appellants.	Order Denying Petition for Rehearing with Suggestion for Rehearing En Banc

Appellee's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Chief Judge Lay and Judges McMillian, Arnold and Wollman voted to grant the petition for rehearing en banc.

Petition for rehearing by the panel is also denied.

December 11, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eight Circuit

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5485ND

State of North Dakota ex rel. Board of University and School Lands,

Appellee,

v.

Clayton K. Yeutter, U.S. Secretary of Agriculture; Milton Hertz, Administrator of the Agricultural Stabilization and Conservation Service; James M. Davis, Assistant Deputy Administrator of the Agricultural Stabilization and Conservation Service,

Appellants.

• • •

State of North Dakota ex rel. Board of University and School Lands,

Appellee,

v.

Clayton K. Yeutter, U.S. Secretary of Agriculture; Milton Hertz, Administrator of the Agricultural Stabilization and Conservation

Appeal from the United States District Court for the District of North Dakota.

Service; Thomas A. Vongarlem, Assistant Deputy Administrator of the Agricultural Stabilization and Conservation Service,

Appellants.

No. 89-5497ND

State of North Dakota ex rel. Board of University and School Lands,

Appellee/Cross-Appellant,

v.

Clayton K. Yeutter, U.S. Secretary of Agriculture; Milton Hertz, Administrator of the Agricultural Stabilization and Conservation Service; James M. Davis, Assistant Deputy Administrator of the Agricultural Stabilization and Conservation Service,

Appellants/Cross-Appellees.

* * *

State of North Dakota ex rel. Board of University and School Lands,

Appellee/Cross-Appellant,

v.

Clayton K. Yeutter, U.S. Secretary of Agriculture; Milton Hertz, Administrator of the Agricultural

Stabilization and Conservation Service; Thomas A. Vongarlem, Assistant Deputy Administrator of the Agricultural Stabilization and Conservation Service,

Appellants/Cross-Appellees.

Submitted: June 13, 1990

Filed: September 12, 1990

Before MAGILL, Circuit Judge, ROSS, Senior Circuit Judge, and LARSON,* Senior District Judge.

MAGILL, Circuit Judge.

The Secretary of the United Sates Department of Agriculture appeals from a district court decision ordering him to promulgate procedural and substantive regulations implementing 16 U.S.C. § 3835(a)(1). This section provides that land may not be enrolled in the Conservation Reserve Program (CRP) if it has changed ownership in the preceding three years, but allows the Secretary to waive the three-year ownership requirement if he determines the land was acquired under circumstances that give adequate assurance it was not acquired for the purpose of placing it in the CRP. The State of North Dakota

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*THE HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

cross-appeals, seeking reversal of the district court's holding that the Secretary's waiver determination is not subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. We affirm this holding and accordingly deny the state's cross-appeal. We reverse the district court's decision insofar as it orders the Secretary to promulgate regulations implementing § 3835(a)(1).

I.

The CRP was established by the Food Security Act of 1985. Pub. L. No. 99-198, §§ 1201, 1231-1236, 99 Stat. 1354, 1504-05, 1509-14 (codified as amended at 16 U.S.C. §§ 3801, 3831-3836 (1988)). This program permits owners and operators of highly erodible cropland to submit offers for long-term contracts with the Secretary under which they agree to place land into soil-conserving uses in exchange for annual rental payments from the Secretary. One of the eligibility requirements for participation in the CRP is that the land must not have changed ownership in the three years prior to the start of the contract period. This three-year ownership requirement and its exceptions are set forth in § 3835(a)(1):

> (1) No contract shall be entered into under this subchapter concerning land with respect to which the ownership has changed in the 3-year period preceding the first year of the contract period unless –
>
> > (A) the new ownership was acquired by will or succession as a result of the death of the previous owner;

(B) the new ownership was acquired before January 1, 1985;

(C) *the Secretary determines that the land was acquired under circumstances that give adequate assurance that such land was not acquired for the purpose of placing it in the program established by this subchapter;* or

(D) the ownership change occurred due to foreclosure on the land and the owner of the land immediately before the foreclosure exercises a right of redemption from the mortgage holder in accordance with State law. (Emphasis added).

The dispute in this case centers on the third exception.

In November 1987, the State of North Dakota acquired title to two tracts of land through mortgage foreclosures. At the time the state commenced foreclosure proceedings in July 1986, the mortgage payments for the properties had been delinquent for four and five years respectively. On February 10, 1988, North Dakota submitted CRP applications for the two tracts with the appropriate county committees of the Agricultural Stabilization and Conservation Service.[1] The committees denied the applications, as did the reviewing authorities at each level of the administrative appeal process. The applications were rejected on the grounds that North Dakota had not owned the land for three years and did not qualify for a waiver of the three-year ownership requirement under § 3835(a)(1)(C). In making the determination not to grant a waiver, the Secretary relied upon an administratively-

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[1] The Secretary has delegated administration of the CRP to the ASCS. *See* 7 C.F.R. §§ 2.65(a)(40), 704.3(a) (1990).

developed standard under which it is presumed that land acquired after October 1, 1985 (and held for less than three years) was acquired for the purpose of placing it in the CRP because information about the program had been well publicized by that date.

North Dakota brought an action in the district court seeking review of the Secretary's final decision denying its CRP applications. The state requested (1) a declaratory judgment that the decision was arbitrary, capricious, and an abuse of discretion; and (2) an order requiring the Secretary to immediately place the state's land in the CRP. Although it held that the Secretary's waiver determination is unreviewable, the district court nevertheless proceeded to find that the Secretary's reliance on a date-of-acquisition standard is arbitrary, capricious, and an abuse of discretion. *North Dakota ex rel. Bd. of Univ. & School Lands v. Yeutter*, 711 F. Supp. 517, 520-21 (D.N.D. 1989). The court then ordered that the case be remanded to the Secretary with directions to promulgate procedural and substantive regulations implementing § 3835(a)(1). The court did not grant North Dakota's request for an order requiring enrollment of its land in the CRP.

II.

There is a strong presumption that agency actions are reviewable under the APA. *Woodsmall v. Lyng*, 816 F.2d 1241, 1243 (8th Cir. 1987). Notwithstanding this presumption, 5 U.S.C. § 701(a) states that the APA's provisions for judicial review do not apply "to the extent that – (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." It is undisputed

that the statutory provisions governing the CRP do not explicitly preclude judicial review of the Secretary's determination whether to waive the three-year ownership requirements. Thus, the threshold jurisdictional issue in this case is whether that determination falls within the § 701(a)(2) exception to judicial review.

In its first discussion of § 701(a)(2), the Supreme Court described it as "a very narrow exception . . . applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). In an effort to implement *Overton Park*, this court followed an approach used by the District of Columbia Circuit, recognizing that " '[i]n practice, the determination of whether there is "law" to apply necessarily turns on pragmatic considerations as to whether an agency determination is the proper subject of judicial review.' " *Tuepker v. Farmers Home Admin.*, 708 F.2d 1329, 1332 (8th Cir. 1983) (quoting *Natural Resources Defense Council, Inc. v. SEC*, 606 F.2d 1031, 1043 (D.C. Cir. 1979)). The *Tuepker* court explained this approach as follows:

> In determining reviewability of an agency's actions, a court must look at the allegations raised in the complaint, together with the governing statutes and regulations, and determine: (1) whether the challenged agency action is of the type Congress intended to be left to a reasonable exercise of agency expertise; and (2) whether the problem raised is one suitable for judicial determination. It is only then that a court can sufficiently ascertain whether there is 'law' to apply within the meaning of *Overton Park*.

Id. Subsequently, in *Heckler v. Chaney*, 470 U.S. 821, 830 (1985), the Supreme Court elaborated on the § 701(a)(2) exception by explaining that "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."

In *Woodsmall*, 816 F.2d at 1245, we concluded that "*Chaney*'s emphasis on statutory language as the source of law to apply casts doubt on the 'pragmatic considerations' approach" adopted in *Tuepker*. We noted that "[t]he *Chaney* Court disparagingly referred to pragmatic considerations . . . as amounting to 'an assessment of whether the interests at stake are important enough to justify intervention in the agencies' decisionmaking.' " *Id.* (quoting *Chaney*, 470 U.S. at 834). However, we left open the issue whether *Chaney* invalidated the *Tuepker* approach because the outcome in *Woodsmall* would have been the same under either *Tuepker* or an approach emphasizing the centrality of the statutory language. *Id.*

Our opinion in *Woodsmall* identified one potential basis for limiting the reach of *Chaney*. We observed that *Chaney* concerned an agency refusal to take enforcement action and that the Court concluded an agency decision not to take such action was presumptively unreviewable, in contrast to other agency decisions. *Id.* at 1244-45; *Chaney*, 470 U.S. at 831-35. Thus, we found that *Chaney's* "emphasis on statutory language arguably can be confined to the context of refusals to take enforcement action." *Woodsmall*, 816 F.2d at 1245.

This possible basis for limiting the applicability of the *Chaney* approach is no longer tenable in light of

Webster v. Doe, 486 U.S. 592, 599-601 (1988), where the Supreme Court found that a decision to discharge an employee of the Central Intelligence Agency is committed to agency discretion by the language and structure of § 102(c) of the National Security Act (NSA). The Court reaffirmed that "under § 701(a)(2), even when Congress has not affirmatively precluded judicial oversight, 'review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Id.* at 599-600 (quoting *Chaney*, 470 U.S. at 830). *Webster* cannot be read as confining this approach specifically to agency refusals to take enforcement action, or in general to contexts in which a presumption of nonreviewability would apply. The Court's description of the holding in *Chaney* did not characterize it as dependent upon such a presumption. *See id.* at 600. It stated that *"[b]oth Overton Park* and *Heckler [v. Chaney]* emphasized that § 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based." *Id.* (emphasis added). Like *Webster*, *"Overton Park* did not involve an agency's refusal to take requested enforcement action." *Chaney*, 470 U.S. at 831. Moreover, as was noted in the court of appeals opinion in the *Webster* case, the government conceded that the presumption of reviewability applied to the agency's discharge decision. *Doe v. Casey*, 796 F.2d 1508, 1517 & n.29 (D.C. Cir. 1986). We are therefore constrained to conclude, as the district court did, that *Chaney* and *Webster* together render the *Tuepker* "pragmatic considerations" approach invalid.[2]

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[2] It appears the District of Columbia Circuit has also come to the conclusion that the "pragmatic considerations" approach

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Applying the Supreme Court's approach, we find that the § 701(a)(2) exception to judicial review applies to the Secretary's waiver determination under § 3835(a)(1)(C). The statute at issue in *Webster* allowed the termination of a CIA employee whenever the Director of the agency " 'shall *deem* such termination necessary or advisable in the interests of the United States' . . . , not simply when the dismissal *is* necessary or advisable to those interests." *Webster*, 486 U.S. at 600 (emphasis added by Court) (quoting § 102(c) of NSA). The court concluded that "[t]his standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review." *Id.* Thus, the *Webster* Court found significance in the "distinction between the objective existence of certain conditions and the [agency's] determination that such conditions are present." *Kreis v. Secretary of Air Force*, 866 F.2d 1508, 1513 (D.C. Cir. 1989). The language of § 3835(a)(1)(C) draws the same type of distinction by providing for an exception from the three-year ownership requirement if *"the Secretary determines* that the land was acquired under circumstances that give adequate assurance that such

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is no longer valid. *See United States Information Agency v. Krc*, 905 F.2d 389, 396-97 (D.C. Cir. 1990) (stating that "[a]bove all, § 701(a)(2) requires us to examine carefully the statute on which the claim of illegal agency conduct is based," and then limiting analysis to the relevant statutory provisions); *see also Sierra Club v. Yeutter*, 1990 Westlaw 114253 (10th Cir. Aug. 13, 1990) (*Webster* "stands for the proposition that where a statute provides 'no substantive standards on which a court could base its review,' . . . then the agency action is unreviewable") (quoting *Webster*, 486 U.S. at 600).

land was not acquired for the purpose of placing it in the program established by this subchapter." Like the statute in *Webster*, this statutory standard "fairly exudes deference" to the Secretary. As the district court correctly observed, § 3835(a)(1)(C) gives the Secretary extremely broad discretion and supplies no objective criteria for determining the existence of adequate assurance. We are simply unable to discern from the language of the statute any meaningful standard against which a court could judge the Secretary's exercise of his discretion to determine whether adequate assurance exists.

The statutory framework in which § 3835(a)(1)(C) is embedded provides a further indication that implementation of the section is committed to the Secretary's discretion. A host of other provisions in the subchapter governing the CRP accord the Secretary broad discretion in his administration of various aspects of the program.[3] We likewise find nothing in either the legislative history of the CRP provisions or the regulations implementing the program that lessens the wide latitude given the Secretary under § 3835(a)(1)(C). Accordingly, we conclude that the § 3835(a)(1)(C) waiver determination is committed to agency discretion by law and therefore is not subject to judicial review under the APA.

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[3] *See* 16 U.S.C. § 3801(a)(6), (a)(7)(A)(ii), (a)(7)(B); § 3831(c)(1)(A), (c)(2), (d); § 3832(a)(5)(A)-(B), (a)(6)(B), (a)(7), (a)(10); § 3833(1); § 3834(a)(2)(B), (b), (c)(1)-(2), (d)(2)(C), (d)(3), (e), (f)(2)(A)(ii); § 3835(c), (d)(1); § 3836(b).

III.

We turn now to the second part of the district court's decision, which ordered the Secretary to promulgate procedural and substantive regulations implementing § 3835(a)(1). As an initial matter, we note that the terms of the court's remand order apply to all four exceptions to the three-year ownership rule set forth in § 3835(a)(1). *See* 711 F.Supp. at 521. However, North Dakota has not challenged the Secretary's implementation of § 3835(a)(1)(A), (B) or (D), and there is nothing in the record before us that would support such a challenge. Accordingly, there is no basis in this case for the court's order insofar as it applies to these three exceptions.

After correctly holding that § 701(a)(2) precludes judicial review of the Secretary's waiver determination in this case, the district court inexplicably proceeded to scrutinize the Secretary's use of a date-of-acquisition standard in making that determination. The court had no jurisdiction to conduct such a review. It is self-evident that § 701(a)(2) necessarily deprives a court of jurisdiction to review the sufficiency of the reasons underlying a particular agency action that is committed to the agency's discretion by law.[4] North Dakota does not attempt to argue otherwise. Thus, the district court erred to the extent it purported to base its order on an evaluation of

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[4] The patent nature of this proposition is reflected in the *Webster*, *Chaney* and *Woodsmall* decisions, which did not examine the merits of the particular agency action at issue after finding it came within the § 701(a)(2) exception to judicial review.

the merits of the Secretary's waiver determination in this case.[5]

Although § 701(a)(2) precludes judicial review of the Secretary's waiver determination, we have jurisdiction to review the legal question whether the Secretary must promulgate additional regulations as ordered by the district court. *See Woodsmall*, 816 F.2d at 1246. Our review of this question discloses no grounds warranting the court's order.

The Secretary has already promulgated regulations establishing uniform reconsideration and appeal procedures for parties who are dissatisfied with an administrative determination rendered under the CRP, including determinations made with respect to the denial of participation in the program. *See* 7 C.F.R. §§ 704.27, 780.1-780.13 (1990); *see also Esch v. Yeutter*, 876 F.2d 976, 986-87, 992 (D.C. Cir. 1989) (summarizing procedures). These regulations satisfy 16 U.S.C. § 3843(a), which provides that "[t]he Secretary shall establish, by regulation, an appeal procedure under which a person who is adversely affected by any determination made under this chapter may seek review of such determination." North Dakota does not allege that the established procedures are in any way deficient or that the Secretary failed to comply with them. Despite the absence of such allegations, the district court apparently found that the existing regulations do

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[5] After holding § 701(a)(2) applies, the court did observe the consequent limits on its jurisdiction to grant North Dakota relief by denying the state's request for an order requiring the Secretary to enroll its land in the CRP.

not "provide procedural fairness," but yet did not identify any such shortcomings in the regulations. 711 F. Supp. at 521.[6] The Supreme Court has emphasized that the formulation of administrative procedures is "basically to be left within the discretion of the agencies to which Congress ha[s] confided the responsibility for substantive judgments." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978). We find the Secretary has not exceeded the bounds of this discretion in formulating the existing reconsideration and appeal procedures. These uniform procedures are far from the sort of procedural vacuum that would warrant judicial intervention to compel the promulgation of additional regulations. *See Allison v. Block*, 723 F.2d 631, 633-36 (8th Cir. 1983).

The district court found that the Secretary has a "clear duty" to promulgate regulations establishing substantive standards for the § 3835(a)(1)(C) waiver determination. 711 F. Supp. at 521. We cannot agree. Whether such standards should be developed through rulemaking or case-by-case adjudication is a choice " 'that lies primarily in the informed discretion of the administrative agency.' " *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203

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[6] The only specific procedure required by the court's remand order is "written notice of the Secretary's decision finding that no exception applies." 711 F. Supp. at 521. However, the court's opinion itself demonstrates that the Secretary already provides such notice. *See id.* (quoting "notice of disapproval" sent to state); *see also* 7 C.F.R. § 780.9(a) (reviewing authority must provide party with written notification of its determination).

(1947)). The Supreme Court has indicated that an agency's judgment in exercising this discretion "is entitled to great weight." *Id.* at 294. Nevertheless, there may be situations where an agency's "reliance on adjudication would amount to an abuse of discretion or a violation" of the governing statutes. *Id.* We find neither circumstance present here.

The Secretary's decision to rely on case-by-case adjudication in implementing § 3835(a)(1)(C) does not violate any express provision of the statutes governing the CRP. The language of the section authorizing the Secretary to promulgate regulations is permissive rather than mandatory. It states that prior to a specified date, "the Secretary shall issue such regulations as *the Secretary determines are necessary* to carry out" the program. 16 U.S.C. § 3844 (emphasis added). Furthermore, the use of adjudication to develop standards does not violate any implicit obligation of "[g]ood faith consideration" contained in § 3835(a)(1)(C). *Allison*, 723 F.2d at 636. Although such an obligation could be said to necessitate "the existence of some substantive standards," *id.*, it would not require the Secretary to develop those standards through rulemaking even if he had failed altogether to implement the statute. *Id.* at 637-38 (recognizing Secretary could choose to develop necessary substantive criteria for loan deferral program through either adjudication or rulemaking even though Secretary had previously refused completely to implement program); *see also United States v. Markgraf*, 736 F.2d 1179, 1185 (7th Cir. 1984) (finding court could not "dictate the process through which the Secretary must act to articulate standards" for loan deferral program), *cert. dismissed*, 469 U.S. 1199 (1985).

Finally, we cannot say that the Secretary has abused his discretion in choosing adjudication rather than rulemaking to develop substantive criteria guiding the § 3835(a)(1)(C) waiver determination. Because the particular circumstances under which farmland is acquired can vary so greatly from case to case, we believe "[i]t is doubtful whether any generalized standard could be framed which would have more than marginal utility." *NLRB v. Bell*, 416 U.S. at 294. The existence of "adequate assurance" for purposes of § 3835(a)(1)(C) is a problem that can justifiably be characterized as "so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule." *Chenery*, 332 U.S. at 203. In such a situation, "the agency must retain power to deal with the problem[] on a case-to-case basis if the administrative process is to be effective." *Id.*

Contrary to the apparent view of the district court, we do not believe that the Secretary's development and use of a date-of-acquisition standard amounts to a refusal to engage in reasoned decisionmaking. The application and further elucidation of such a standard on a case-by-case basis does not constitute "complete abdication of the Secretary's responsibilities" under § 3835(a)(1)(C), *Allison*, 723 F.2d at 638, which would warrant a conclusion that the Secretary has abused his discretion in relying on adjudication. Although the district court characterized the Secretary's standard as a "bright line test," 711 F. Supp. at 521, the record bears out the Secretary's position that it operates as a rebuttable presumption. The record discloses instances where the Secretary has found adequate assurance that land which changed ownership after October 1, 1985 was not acquired for the

purpose of placing it in the CRP.[7] In our view, the fact that a court could disagree with the strength of the presumption applied by the Secretary in § 3835(a)(1)(C) waiver adjudications does not provide a sufficient ground for ordering him to engage in rulemaking.

IV.

For the foregoing reasons, we affirm the district court's holding that the Secretary's § 3835(a)(1)(C) waiver determination is not subject to judicial review under the APA and deny North Dakota's cross-appeal. We reverse that part of the court's decision ordering the Secretary to promulgate regulations implementing § 3835(a)(1).

LARSON, Senior District Judge, concurring and dissenting in part.

I agree with the majority that the Secretary may properly decide to implement section 3835(a) of the Conservation Reserve Program (CRP) through adjudication on a case by case basis, and I join in the court's opinion insofar as it reverses the district court's order requiring the Secretary to promulgate rules to implement this section. I respectfully dissent, however, from the majority's holding that the court lacks jurisdiction to review the

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[7] For example, the Secretary has found the requisite adequate assurance with respect to land acquired after October 1, 1985 in the following cases: (1) the purchaser had a controlling interest in the entity from which the land was acquired; (2) at the time of purchase, the land was technically ineligible for the CRP because it did not meet erodibility guidelines; and (3) a lending institution returned the title to foreclosed land to the original owner. Joint Appendix at 35.

agency's adjudicatory action. In my view, the court can and should rule on whether the Secretary acted arbitrarily and capriciously in refusing to allow North Dakota to participate in CRP based upon an internal agency presumption or "bright line test" that land acquired after October 1, 1985, was acquired for the purpose of placing it in the CRP.

The majority reaches its conclusion that the court lacks jurisdiction based upon a narrow reading of the statutory language contained in section 3835(a), which, according to the majority, provides the court with "no law to apply." I am not as convinced as the majority that the Supreme Court's decision in *Webster v. Doe*, 486 U.S. 592 (1988), restricts our inquiry concerning the reviewability of agency action to statutory language alone. Both *Webster* and its predecessor, *Heckler v. Chaney*, 470 U.S. 821 (1983), involved areas where courts traditionally have been reluctant to intervene: national security in *Webster* and traditional prosecutorial discretion in *Chaney*. *See* 486 U.S. at 600-01; 470 U.S. at 831-32.

While I agree that the starting point for determining the application of section 702(a)(2) should be the specific language and overall structure of the legislation, I am hesitant to exclude consideration of other factors which may well assist the court in determining whether the question presented by the plaintiff is one which "is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). As Justice O'Connor noted in her concurring opinion in *Webster*, "I do not understand the Court to say that the exception in § 702(a)(2) is *necessarily* or *fully* defined by reference to statutes 'drawn in such broad terms that in a given case there is no law to apply.' " *Webster*, 486 U.S. at

605 (O'Connor, J. concurring in part and dissenting in part) (emphasis supplied).

Moreover, even assuming the test of reviewability is confined to the specific statutory language, I believe section 3815(a) provides a sufficient standard under which to review agency action in this case. The requirement that individuals own land for at least three years was designed to "prevent the type of speculator/investor abuse which has occasionally cropped up under previous programs." H.R. Rep. No. 99-271, Part 1, 99th Cong. 1st Sess. 82 (1985), *reprinted in* 1985 U.S. Code Cong. & Admin. News 1103, 1186.

Section 3835(a)(1) sets out the rule that "[n]o contract shall be entered into" with landowners who have held their land less than three years, *unless* (A) the ownership was acquired by will or succession as a result of the death of the previous owner; (B) the ownership was acquired prior to the effective date of the CRP program; (C) the Secretary "determines that the land was acquired under circumstances that give adequate assurance that such land was not acquired for the purpose of placing it in the program;" or (D) there was a foreclosure and the prior owner exercised his or her right of redemption under state law. Section 3835(a)(2) further provides that (A) a new owner is entitled to continue an agreement already in force (the contract runs with the land), and (B) a farmer who rents land may participate so long as the farmer has control over the land for the contract period and has farmed it for at least three years or prior to the effective date of the CRP. *See* 16 U.S.C. § 3835(a).

The majority concludes that the term "adequate assurance" in this context provides no law to apply. I disagree. Courts have not hesitated to hold, under other statutory schemes, that an agency's determination of "satisfactory assurances" is subject to judicial review. *See, e.g., Johnston v. Davis*, 698 F.2d 1088, 1093 (10th Cir. 1983) (and cases cited therein). That the statutory scheme vests the Secretary with broad discretion in determining eligibility for the CRP program, and that courts should defer to that discretion, does not render the Secretary's administration of the program *unreviewable*. *See generally Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670-71 (1986) (noting strong presumption that Congress intends judicial review of administrative action).

In this case, the State of North Dakota contends the Secretary has abdicated his statutory responsibility under section 3818(a)(C) be adopting a "bright line test" that land purchased after October 1, 1985, must be held for three years in order to participate in the program. The district court agreed that the Secretary had adopted such a test, and had uniformly applied it to find "adequate assurances" lacking except in two very narrow circumstances: when the land did not fit the definition of "erodible" at the time of acquisition or where the transfer was one of form rather than substance.

The state argues the Secretary's position is arbitrary because, rather than examine the specific facts regarding its acquisition of the lands in question, the Secretary mechanically applied the "bright line test." The record lends some support to this contention. It is undisputed that the state initially became involved with the land through the Bank of North Dakota, which lent money to

two farm families in connection with a state/Farmers Home Administration loan program. The loans were made in 1978, seven years prior to the establishment of the CRP, and were secured in part by a mortgage on the families' farm property.

The farmers were four and five years delinquent on their payments when the state determined that all other options had failed and foreclosure was required. Foreclosure went forward, the farmers failed to redeem their property during the one year redemption period allowed by state law, and the state received title to the lands in November, 1987. In 1988, the state applied for participation in the CRP. One of the farmers had participated in CRP prior to the foreclosure, but the contract was cancelled during the redemption period, so the state could not continue the contract as a successor in interest.

In the statement of undisputed material facts filed by the Secretary in connection with the Secretary's motion for summary judgment,[1] the Secretary conceded that the state's land qualifies for inclusion in the CRP and that the state's applications were denied "because the State had owned the property it sought to enroll for less than three years." The Secretary's notice of disapproval offered the following rationale:

> It has been determined that after October 1, 1985, there was sufficient information available about the Food Security Act of 1985 for the

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[1] North Dakota Local Rule 5 requires parties to submit, in addition to brief in support of a motion for summary judgment, a short and concise statement of the material facts as to which there is no genuine issue to be tried.

> public to be aware of CRP; therefore, *we have established* that any land purchased after October 1, 1985, may have been acquired under circumstances that *cannot* give adequate assurance that the land was not acquired for the purpose of placing it in CRP (emphasis supplied).

Because the district court held it lacked jurisdiction, it did not reach the question of whether the agency acted arbitrarily in failing to consider the specific facts before it or in failing to explain why "adequate assurances" were nonetheless lacking. I would reverse and remand to give the district court the opportunity to address this question.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

STATE OF NORTH DAKOTA EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS, Plaintiff,

v.

Clayton K. YEUTTER, U.S. Secretary of Agriculture; Milton Hertz, Administrator of the Agricultural Stabilization and Conservation Service; James M. Davis, Assistant Deputy Administrator of the Agriculture Stabilization and Conservation Service, Defendants.

STATE OF NORTH DAKOTA EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS, Plaintiff,

v.

Clayton K. YEUTTER, U.S. Secretary of Agriculture; Milton Hertz, Administrator of the Agricultural Stabilization and Conservation Service; Thomas A. Vongarlem, Assistant Deputy Administrator of the Agriculture Stabilization and Conservation Service, Defendants.

Civ. Nos. A1-88-179, A1-88-198.

United States District Court,
D. North Dakota, Southwestern Division.

April 20, 1989.

Charles M. Carvell, Ass't. Atty. Gen., State Land Dept., Bismarck, N.D., for plaintiff.

Gary Annear, U.S. Atty., Fargo, N.D., Margaret Plank, Trial Atty., Federal Programs Branch, Civ. Div., U.S. Dept. of Justice, Washington, D.C., for defendants.

MEMORANDUM AND ORDER

CONMY, Chief Judge.

The facts of these two actions are not in dispute. Civil number A1-88-179 concerns a 101.8 acre tract of land located in township 148 north, range 62 west, of Eddy County, North Dakota. In November of 1978, the North Dakota Board of University and School Lands, through the Bank of North Dakota (the State), loaned money to Sigurd Arnold and Delores Haugland, owners of the tract. The loan was secured by a mortgage on the 101.8 acres. On July 15, 1986, the State decided to foreclose on the tract since mortgage payments had been delinquent for the past five years. Title passed to the State on November 16, 1987, by sheriff's deed after the owners failed to redeem within the prescribed period under North Dakota law. The North Dakota Board of University and School Lands, as the rightful owner of the tract, made application with the Eddy County ASCS Committee on February 10, 1988, to have the land placed in the Conservation Reserve Program (CRP). The Eddy County Committee denied the application on March 10, 1988, finding that the State was ineligible to participate in the CRP until the land had been owned for three years.

Civil number A1-88-198 concerns a separate tract of land consisting of 314.9 acres in section 4, township 153 north, range 77 west, of McHenry County, North Dakota. Melvin and Sharon Klimpel, the owners of the land, were loaned money by the State on December 4, 1978, and as security the State took a mortgage on this tract. The State foreclosed on this tract of land as well on July 15, 1986, at which time the Klimpels were approximately four years delinquent in their payments. Title passed to the State on November 13, 1987, again by sheriff's deed after the Klimpels also failed to redeem their land. Application

was made with the McHenry County ASCS Committee on February 10, 1988, to have this land placed in the CRP. Here too, however, the Committee denied the application for the same reason the application concerning the 101.8 acre tract was denied.

Both decisions were appealed through the administrative appeals process. The State of North Dakota then commenced the present actions in federal district court after a final decision was issued by the the Secretary of Agriculture denying the State's applications to include the two separate parcels of land in the CRP. Pursuant to an order of this court the actions have been consolidated. Cross-motions for summary judgment have been filed by the respective parties.

The CRP is intended to induce land owners of highly erodible land to remove the property from agricultural usage and put it into grass or other cover in order to stabilize the topsoil.[1] Congress believed a successful conservation program would; (1) protect the country's long-term capability to produce food and fiber; (2) reduce soil erosion on land in the program by as much as 20 tons per acre per year; (3) reduce sedimentation in streams and along roads; (4) improve water quality; (5) create better habitat for fish and wildlife through improved food and cover and better moisture conditions; (6) curb production of surplus commodities; and (7) provide some needed

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[1] *See* H.R. No. 271, 99th Cong., 1st Sess., pt. 1, 78 (1985) *reprinted in* 1985 U.S.Code Cong. & Admin.News 1103, 1182; S.Rep. No. 145, 99th Cong., 1st Sess., 300 (1985) *reprinted in* 1985 U.S.Code Cong. & Admin.News 1676, 1966.

income support for farmers.[2] As implemented the program does not exclude political subdivisions, corporations, or financial institutions who may have acquired land. *See* 7 CFR § 704.2(19) (1988). The program works by lease agreements between the government and the land owners whereby the government pays, in effect, a cash rent for a minimum of ten years. *See* 16 U.S.C. § 3831 (1988 Supp.).

Safeguards designed into the administration include a maximum of acres per county, a maximum appropriated budget and the grant of wide discretion to the program administrator. Another safeguard is designed to prevent speculators from purchasing marginal lands solely for the purpose of placing the land in the conservation program. To achieve this objective, Congress intended that land be ineligible for the conservation acreage reserve if there had been an ownership change in the preceding three years. *See* 16 U.S.C. § 3835(a)(1) (1988 Supp.)[3] Exceptions to the general rule were recognized. Land otherwise excludable under the three year rule could be placed in the conservation program if (1) the new ownership was acquired by will or succession; (2) the new ownership was acquired before January 1, 1985; (3) the change occurred as a result of a foreclosure followed by the owner exercising his redemption rights; or (4) the Secretary of Agriculture determines that the land was acquired under circumstances which give adequate assurance that

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[2] H.R. No. 271, 99th Cong., 1st Sess., pt. 1, 81 (1985) *reprinted in* 1985 U.S.Code Cong. & Admin.News 1103, 1185.

[3] *See also* S.Rep. No. 145, 99th Cong., 1st Sess., 306 (1985) *reprinted in* U.S.Code Cong. & Admin.News 1676, 1972.

such land was not acquired for the purpose of placing it in the program. *See* 16 U.S.C. § 3835(a)(1) (1988 Supp.).

In denying the State's applications, the Secretary determined that there was not "adequate assurance" that the property was not acquired to place it in the reserve program. The State thus commenced the above actions challenging the Secretary's actions as being arbitrary, capricious, and an abuse of discretion, and otherwise not in accordance with the law. The State contends that adequate assurances do exist for an exception to the three year ownership rule. The State further contends that the Secretary abused his discretion by ignoring the statutory exceptions to the three year ownership rule and by refusing to make a proper determination under the "adequate assurance" exception. The State seeks declaratory relief declaring that the Secretary's decisions are unlawful. The State also seeks an order requiring the Secretary to immediately place the parcels of land in question in the conservation program.

The Secretary contends that under the Administrative Procedures Act this court lacks subject matter jurisdiction to consider the case. The Administrative Procedures Act provides that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. § 702. Section 701(a)(2) further provides, however, that judicial review of agency action is precluded to the extent that it is committed to agency discretion by law. 5 U.S.C. 701(a)(2). This exception to judicial review of agency action has been interpreted very narrowly and held to apply only in those "rare instances where statutes

are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971) (quoting S.Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)). The Secretary contends that the statute at issue here expressly gives the Secretary discretion to waive the three year ownership rule and that no guidelines for review are provided.

The State contends that the court does have jurisdiction based on pragmatic considerations in determining whether there is law to apply to the case. The pragmatic approach was adopted by the Eighth Circuit Court of Appeals in *Tuepker v. Farmers Home Admin.*, 708 F.2d 1329 (8th Cir. 1983). In *Tuepker* the court stated:

> In determining reviewability of an agency's actions, a court must look at the allegations raised in the complaint, together with the governing statutes and regulations, and determine: (1) whether the challenged agency action is of the type Congress intended be left to a reasonable exercise of agency expertise: and (2) whether the problem raised is one suitable for judicial determination. It is only then that a court can sufficiently ascertain whether there is "law" to apply within the meaning of *Overton Park*.

Id. at 1332. The Supreme Court has recently concluded, however, that judicial review is precluded under section 701(a)(2) of the APA when the statute at issue is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion. *Heckler v. Chaney*, 470 U.S. 821, 830, 105 S.Ct. 1649, 1655, 84 L.Ed.2d 714 (1985); and *Webster v. Doe*, ___ U.S. ___, 108 S.Ct. 2047, 2052, 100 L.Ed.2d 632 (1988). In these rare

instances, the Court determined that the statute must be interpreted as having committed the decision making to the agency's judgment absolutely. *Heckler*, 470 U.S. at 830, 105 S.Ct. at 1655.

More recently the Eighth Circuit Court in *Woodsmall v. Lyng* had an opportunity to decide whether its pragmatic approach was overturned by the Court's decision in *Chaney*, but avoided deciding the issue. *Woodsmall*, 816 F.2d 1241, 1245. Instead the court concluded that under either approach the agency action at issue in *Woodsmall* was not subject to review. This court, however, finds that the pragmatic consideration approach was rejected by the Supreme Court in *Chaney* and more recently in *Webster* where again the Court stated:

> under § 701(a)(2), even when Congress has not affirmatively precluded judicial oversight, "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion."

Webster, 108 S.Ct. at 2052, (quoting *Chaney* 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985)).

After a careful review of the statutory framework, legislative history, and the implementing regulations for the CRP, the court finds that there are no meaningful standards by which a court can assess the agency's determination that "adequate assurances" do not exist for waiving the three year ownership rule. Congress has determined that the three year ownership rule is necessary to protect against persons acquiring land solely for the purpose of placing the land in the conservation

reserve.[4] Congress further recognized certain exceptions to the three year ownership rule. As noted one of the exceptions authorizes the Secretary to waive the three year ownership rule if he determines that the land was acquired under circumstances that give adequate assurance that the land was not purchased for the purpose of placing it in the conservation acreage reserve program. 16 U.S.C. § 3835(a)(1)(C) (1988 Supp.). Congress, however, did not provide any criteria for determining whether adequate assurances existed. Hence, the court finds that the Secretary's delegation is very broad and that the court is left with no meaningful standard against which to assess the agency's decision. Consequently, the court holds that the Secretary's decision regarding adequate assurances is not subject to judicial review because it is a matter committed to agency discretion by law.

This conclusion, however, does not preclude review of the assertion that the Secretary has neglected its statutory responsibilities by failing to promulgate adequate standards for determining whether adequate assurances exist for waiving the three year ownership rule. *Woodsmall v. Lyng*, 816 F.2d 1241, 1246 (8th Cir.1987); *See also State of Iowa ex rel. Miller v. Block*, 771 F.2d 347, n. 1 (8th Cir.1985) (15 U.S.C. § 714b(c), antiinjunctive statute does not preclude court from requiring Secretary to promulgate and implement regulations to fulfill Congress' intent). In the case at bar the State contends that the Secretary has completely refused to even examine the factual basis of the State's eligibility under the "adequate

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[4] S.R. No. 145, 99th Cong., 1st Sess., 306 (1985) *reprinted in* 1985 U.S.Code Cong. & Admin. News 1676, 1972.

assurance" exception. The State further contends that the Secretary has decided to ignore the statutory exception to the three year ownership rule.

The State acquired its interest in the 101.8 acre tract and the 314.9 acre tract on November 16 and November 13, 1987, respectively. The State then made application to place both parcels in the conservation program on February 10, 1988. On reviewing the applications, the Secretary determined that none of the exceptions to the three year ownership rule applied to the facts and therefore denied inclusion of the land in the program. In a notice of disapproval for inclusion it states:

> It has been determined that after October 1, 1985, there was sufficient information available about the Food Security Act of 1985 for the public to be aware of CRP; therefore, we have established that any land purchased after October 1, 1985, may have been acquired under circumstances that cannot give adequate assurance that the land was not acquired for the purpose of placing it in CRP.

The record is replete with such references. The Department of Agriculture has apparently taken the position that any transfer of title to lands which fit the definitions of "highly erodible" occurring after October 1, 1985, makes the transferred property ineligible for the program. The record would indicate that the Secretary has uniformly applied this "bright line test" and has found tracts eligible only where the property did not fit the "highly erodible" definition in use at the time of the transfer, or where the "transfer" was one of form rather than of substance. The North Dakota application has run

aground on this "bright line test" shoal. The record indicates that "but for the date of acquisition" the State owned land would otherwise be eligible.

Where Congress delegates its authority to the Secretary of Agriculture to carry out a governmental program and authorizes the Secretary to determine whether there are adequate assurances that the land was not acquired for the purpose of placing it in the reserve program, the Secretary has a clear duty to promulgate regulations which carry out the intention of Congress. Based on the record in this case, the court finds that the Secretary's "bright line test" regarding acquisitions of property after October 1, 1985, does not further the goals of Congress. Therefore, the Secretary's reliance on the date of purchase only is arbitrary, capricious, and an abuse of discretion.

Based on the foregoing findings, it is the ORDER of the court that the case be remanded to the Secretary of Agriculture. The Secretary is directed to promulgate adequate regulations for purposes of implementing and carrying out section 3835(a)(1) of title 16 of the United States Code as intended by Congress with its enactment. Said regulations shall provide procedural fairness to those persons seeking to enroll in the conservation reserve program, including, but not necessarily limited to, a means by which the person may assert an exception to the three year ownership rule, and written notice of the Secretary's decision finding that no exception applies.

Supreme Court, U.S.
FILED
MAY 10 1991
OFFICE OF THE CLERK

(2)

No. 90-1414

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS, PETITIONER

v.

EDWARD R. MADIGAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Pursuant to 16 U.S.C. 3835(a)(1)(C), the Secretary of Agriculture has the discretion to waive the three-year ownership requirement for land to be placed in the Conservation Reserve Program if "the Secretary determines that the land was acquired under circumstances that give adequate assurance that such land was not acquired for the purpose of placing it in the [Conservation Reserve] program." The question presented is:

Whether the Secretary's decision not to waive the three-year ownership requirement for land to be placed in the Conservation Reserve Program is unreviewable under the Administrative Procedure Act because it is "committed to agency discretion by law," 5 U.S.C. 701(a)(2).

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1414

STATE OF NORTH DAKOTA, EX REL. BOARD OF UNIVERSITY AND SCHOOL LANDS, PETITIONER

v.

EDWARD R. MADIGAN, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 3a-24a, is reported at 914 F.2d 1031. The opinion of the district court, Pet. App. 25a-34a, is reported at 711 F. Supp. 517.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1990. A petition for rehearing was denied on December 11, 1990. Pet. App. 2a. The petition for a writ of certiorari was filed on March 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title XII of the Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1504, authorized establishment of the Conservation Reserve Program (CRP). Congress created the CRP to conserve and improve highly erodible cropland. Landowners with land in the CRP enter into a contract with the Secretary of Argriculture, under which they receive rental payments in exchange for agreeing not to use the land for agricultural purposes, except as permitted by the Secretary. See 16 U.S.C. 3831, 3832.

Participation in the CRP is restricted by statute to persons who have owned the land sought to be enrolled for three years. 16 U.S.C. 3835(a)(1). There are four exceptions to this requirement. One of the exceptions authorizes the Secretary to waive the requirement if "the Secretary determines that the land was acquired under circumstances that give adequate assurance that such land was not acquired for the purpose of placing it in the [CRP]." 16 U.S.C. 3835(a)(1)(C). To apply that exception, the Secretary has administratively developed a rebuttable presumption that all land acquired after October 1, 1985—a date after which the CRP was well publicized—was probably acquired because of the existence of the CRP, and, for that reason, the Secretary could not be adequately assured that such land was not acquired for the purpose of having that land placed in the program. The presumption can be rebutted by showing that the property could not have been admitted into the program at the time of the transfer, or that the transfer was one of form rather than substance. Pet. App. 7a-8a, 33a.

2. Petitioner the State of North Dakota applied to have two tracts of land that it acquired through mortgage foreclosures placed in the CRP. Pet. App. 7a. Having owned the land for less than three years, petitioner sought a waiver of the three-year ownership rule pursuant to 16

U.S.C. 3835(a)(1)(C). The Secretary determined that petitioner had failed to provide adequate assurances that the land – which it acquired after October 1, 1985 – was not acquired for placement in the conservation program. Pet. App. 7a.

North Dakota then filed suit in district court arguing that the Secretary's actions were arbitrary, capricious, and an abuse of discretion, in violation of the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* In response, the government argued that Congress committed the waiver determination to the Secretary's discretion in the Food Security Act of 1985 and that the Secretary's refusal to grant a waiver was not subject to judicial review under the APA, which precludes review when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). The district court agreed that the waiver determination was committed to the Secretary's discretion and was not subject to APA review. Pet. App. 25a-32a. The court concluded that "there are no meaningful standards by which a court can assess the agency's determination that 'adequate assurances' do not exist for waiving the three-year ownership rule." *Id.* at 31a.[1]

3. The court of appeals affirmed by a divided vote. Pet. App. 3a-24a. The court upheld the lower court's ruling that the Secretary's decision whether to waive the statutory three-year ownership requirement was committed to agency discretion by law and was unreviewable under the APA by virtue of 5 U.S.C. 701(a)(2). In reaching that conclusion,

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[1] Nonetheless, the district court went on to review the date-of-acquisition standard adopted by the Secretary and held that it was arbitrary, capricious, and an abuse of discretion. Pet. App. 34a. The court then directed the Secretary to promulgate regulations implementing the waiver provision. *Ibid.* The court of appeals unanimously reversed the district court's ruling on this issue, *id.* at 14a-19a; *id.* at 19a (opinion of Larson, J.), and petitioner has not sought review in this Court of that aspect of the decisions below.

the panel majority ruled that, in making the reviewability determination, this Court's decisions in *Heckler* v. *Chaney*, 470 U.S. 821 (1985), and *Webster* v. *Doe*, 486 U.S. 592 (1988), required a focus on the language of the governing statute, instead of reliance on the type of pragmatic considerations that the Eighth Circuit had previously considered in *Tuepker* v. *Farmers Home Admin.*, 708 F.2d 1329 (1983).[2] Following that approach, the majority observed that the waiver provision at issue here "gives the Secretary extremely broad discretion and supplies no objective criteria for determining the existence of adequate assurance." Pet. App. 13a. Thus, the court concluded that it was "unable to discern from the language of the statute any meaningful standard against which a court could judge the Secretary's exercise of his discretion to determine whether adequate assurance exists." *Ibid.*[3]

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[2] The Eighth Circuit held in *Tuepker* that the determination whether there is "law to apply" required a court to review the allegations in the complaint along with the governing statutes and regulations to determine "(1) whether the challenged agency action is of the type Congress intended to be left to a reasonable exercise of agency expertise; and (2) whether the problem raised is one suitable for judicial determination." 708 F.2d at 1332.

[3] Having determined that there was no review under the APA of the Secretary's waiver determination, the court ruled that the district court lacked the authority to scrutinize and invalidate the Secretary's date-of-acquisition standard for waiver decisions. Pet. App. 14a; see page 3 note 1, *supra*. The court of appeals also reversed the district court's order directing the Secretary to promulgate substantive regulations setting forth standards for determining under what circumstances the three-year ownership rule would be waived and procedural regulations implementing the CRP. The court held that the Secretary's existing regulations afforded sufficient procedural safeguards, and the Secretary was not required to promulgate regulations establishing substantive standards for waiver determinations, but could instead develop such standards through case-by-case adjudication. *Id.* at 15-20a. Petitioner no

On the reviewability issue, Senior District Judge Larson dissented. He concluded that the Secretary's waiver determination was reviewable because the term "adequate assurance" as used in the waiver provision provided a meaningful standard by which to evaluate the Secretary's final ruling. Pet. App. 22a.

ARGUMENT

1. The APA precludes judicial review when "agency action is committed to agency discretion by law." 5 U.S.C. 701(a)(2). In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), this Court first explained what it means for agency action to be "committed to agency discretion." The Court said that Section 701(a)(2) applies "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945)). Fourteen years later, in *Heckler* v. *Chaney*, 470 U.S. 821 (1985), this Court further elaborated on the "no law to apply" standard. In *Chaney*, prison inmates sentenced to death by lethal injection challenged the Food and Drug Administration's refusal to enforce an alleged statutory prohibition against such use of the drugs. While acknowledging that agency determinations regarding whether or not to pursue enforcement actions are presumptively unreviewable, this Court also stated that there is "no law to apply" for Section 701(a)(2) purposes and judicial "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." 470 U.S. at 830.

Webster v. *Doe*, 486 U.S. 592 (1988), contains this Court's most recent discussion of reviewability under Section

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longer takes issue with the court of appeals' ruling on this question. Pet. App. i.

701(a)(2). *Webster* was not an enforcement action, but a case in which a discharged CIA employee sought reinstatement. In *Webster*, the Court stressed that the determination whether agency action is unreviewable under 5 U.S.C. 701(a)(2) requires a close consideration of the text of the governing statute. As this Court explained, "[b]oth *Overton Park* and *Heckler* emphasized that § 701(a)(2) requires careful examination of the statute on which the claim of agency illegality is based." 486 U.S. at 600. The Court observed that the statute at issue in *Webster*—which authorized the Director of Central Intelligence to discharge a CIA employee whenever the Director "shall deem such termination necessary or advisable"—was one that "fairly exudes deference" to the agency. *Ibid.* Accordingly, the Court determined that "the language and structure of [the statute involved] indicate that Congress meant to commit individual employee discharges to the [CIA] Director's discretion," *id.* at 601, thereby precluding judicial review under the APA.

In this case, the court of appeals applied *Chaney* and *Webster*, examining the text of the waiver provision to determine whether the Secretary's decision whether to waive the statutory three-year ownership requirement was committed to his discretion by the Food Security Act of 1985. Like the statute at issue in *Webster*, the text of the Food Security Act of 1985 permits the Secretary to waive the three-year ownership requirement only if "*the Secretary determines* that the land was acquired under circumstances that give adequate assurance that such land was not acquired for the purposes of placing it in the [CRP]." 16 U.S.C. 3835(a)(1)(C) (emphasis added). As the Eighth Circuit explained, that provision "gives the Secretary extremely broad discretion and supplies no objective criteria for determining the existence of adequate assurance." Pet. App. 13a.

2. There is no conflict between any of the decisions cited by petitioner and the Eighth Circuit's conclusion that the Secretary's decision whether to waive the three-year ownership requirement under the Food Security Act of 1985 is not subject to review under the APA. In fact, the Eighth Circuit's decision in this case is the first decision by any federal court of appeals on this question.

Petitioner implicitly concedes as much, because petitioner does not claim that the decision below squarely conflicts with any other circuit court decision interpreting the Food Security Act of 1985. Instead, petitioner maintains that there is some confusion among the circuits on the proper methodology for analyzing reviewability questions. Petitioner argues that the court of appeals, in looking only to the statutory language to determine whether there was law to apply, applied this Court's decisions in *Chaney* and *Webster* too literally, and that such a literal approach is inconsistent with the approach developed by the District of Columbia Circuit in *NRDC, Inc.* v. *SEC*, 606 F.2d 1031 (1979). Pet. 9-13. In *NRDC, Inc.* v. *SEC*, the court concluded that reviewability determinations under 5 U.S.C. 701(a)(2) are to be guided by "pragmatic considerations," and cited three factors to be used to determine whether there was "law" to be applied: "(1) the need for judicial supervision to safeguard the interests of the plaintiffs; (2) the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and (3) the appropriateness of the issues raised for judicial review." 606 F.2d at 1044. Petitioner claims that the Fourth, Sixth, and Seventh Circuits follow that methodology, rather than the one applied by the Eighth Circuit in this case.[4] That claim does not warrant review by this Court.

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[4] See *Sinai Hospital of Baltimore, Inc.* v. *Horvitz*, 621 F.2d 1267 (4th Cir. 1980); *Gillis* v. *HHS*, 759 F.2d 565 (6th Cir. 1985); *Cardoza*

Each of the cases cited by petitioner predates this Court's decision in *Webster* v. *Doe*, *supra*. For that reason, even if the pragmatic approach followed in those cases were in tension with the more rigorous statutory approach endorsed by this Court in *Webster*, there is no reason to believe that those courts would not today follow the same type of analysis that this Court applied in that case. In fact, other decisions by those courts in cases decided after *Webster* or *Chaney* indicate that those circuits now do look to the text of the governing statute in making reviewability determinations.[5] Accordingly, while there may have been some disagreement before *Webster* among the circuits over the correct reviewability analysis, that is no longer the case as the courts apply this Court's decision in *Webster*.

Nor is there any merit to petitioner's suggestion that *Webster* and *Chaney* left unresolved the approach to be used in making review determinations under Section 701(a)(2)—at least where, as here, the text of the pertinent statute itself reveals Congress's intent to leave a decision to the agency's unreviewable discretion. In *Chaney*, this Court clearly disfavored reliance on pragmatic considerations in making

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v. *Commodity Futures Trading Comm'n*, 768 F.2d 1542 (7th Cir. 1985). Petitioner also states that the Eighth Circuit had endorsed the so-called pragmatic approach in *Tuepker*, 708 F.2d at 1332, before rejecting that approach in this case. Pet. 11-12.

[5] See *United States Information Agency* v. *KRC*, 905 F.2d 389, 396 (D.C. Cir. 1990) (citing *Webster* and looking to statutory text to make reviewability determination); *Scalise* v. *Thornburgh*, 891 F.2d 640, 648 (7th Cir. 1989) (reviewability determination is based on the text and structure of the statute, its legislative history, and the nature of the agency action), cert. denied, 110 S. Ct. 1815 (1990); *Kenmons Wilson, Inc.* v. *FAA*, 882 F.2d 1041, 1045-1046 (6th Cir. 1989) (relying on statutory language in ruling that agency action was reviewable); *Electricities of North Carolina* v. *Southeastern Power Admin.*, 774 F.2d 1262, 1265-1266 (4th Cir. 1985) (relying on statutory text to determine reviewability of agency action).

reviewability determinations. *Chaney* described the analysis first adopted in *NRDC, Inc.* v. *SEC*, 606 F.2d at 1043, and applied by the D.C. Circuit in *Chaney* as nothing more than "an assessment of whether the interests at stake are important enough to justify intervention in the agencies' decision-making." 470 U.S. at 834. *Chaney* then emphasized that "[t]he danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance. That decision is in the first instance for Congress, and we therefore turn to the [relevant statute] to determine whether in this case Congress has provided us with 'law to apply.'" *Ibid.*

Any doubt about the validity of the pragmatic considerations approach was certainly laid to rest in *Webster*. *Webster*'s emphasis on the text and structure of the statute involved provides a clear indication that the pragmatic approach is no longer acceptable. As the Eighth Circuit correctly observed, "*Webster* cannot be read as confining this approach specifically to agency refusals to take enforcement action, or in general to contexts in which a presumption of nonreviewability would apply." Pet. App. 11a.

3. As a final matter, petitioner contends that the waiver provision of the Food Security Act of 1985 does include a standard against which the Secretary's action can be reviewed. Petitioner claims that the phrase "adequate assurance" is a standard by which the Secretary's waiver determination can be reviewed. The court of appeals correctly rejected that contention.

Contrary to petitioner's claims, Congress' use of the term "adequate assurance" in this particular context does not supply the courts with an objective standard for review of the Secretary's decision. Congress authorized the Secretary to waive the three-year ownership requirement if "*the Secretary determines*" that such assurances exist, 16 U.S.C.

3835(a)(1)(C) (emphasis added), not if a court finds after-the-fact that the proffered assurances are adequate. Congress provided no criteria in the Act for determining what circumstances constitute "adequate assurance" that land was not acquired for placement in the CRP. Rather, Congress specified that the Secretary must make his own determination as to whether the circumstances of a land acquisition provide adequate assurance that the land was not acquired because of the CRP.

As the court of appeals observed, in determining whether there is a standard for reviewing agency action under Section 701(a)(2), *Webster* makes a distinction between "the objective existence of certain conditions and the [agency's] determination that such conditions are present." Pet. App. 12a (quoting *Kreis* v. *Secretary of the Air Force*, 866 F.2d 1513, 1508 (D.C. Cir. 1989)). The law at issue in *Webster* authorized the Director of Central Intelligence to dismiss a CIA employee whenever the Director "shall deem such termination necessary or advisable in the interests of the United States." 50 U.S.C. 403(c). This Court noted that "[t]his standard fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review." *Webster*, 486 U.S. at 600. As the court of appeals correctly observed in this case, the text of the waiver provision at issue here "draws the same type of distinction by providing for an exception from the three-year ownership requirement if '*the Secretary determines* that the land was acquired under circumstances that give adequate assurance that such land was not acquired for the purpose of placing it in the program established by this subchapter.'" Pet. App. 12a-13a (emphasis added by the court).

Finally, as the court of appeals observed, the wide latitude given the Secretary under the waiver provision is in keeping with the broad discretion generally accorded the Secretary in governing various aspects of the Conservation

Reserve Program. Pet. App. 13a. The Food Security Act of 1985 contains various indicia of congressional intent to leave program participation determinations to the broad discretion of the Secretary. While the Act sets forth the parameters of the Program, the Secretary has discretion to (1) reduce the amount of acreage included in the Program in a given fiscal year, 16 U.S.C. 3831(c); (2) open the Program to land that does not satisfy eligibility guidelines upon a determination of environmental danger, 16 U.S.C. 3831(c)(2); (3) increase the percentage of county acreage included in the Program "to the extent that [he] determines that such action would not adversely affect the local economy of such county," 16 U.S.C. 3831(d); (4) determine in individual cases whether cost-sharing is appropriate, 16 U.S.C. 3834(c); (5) establish different criteria for participation in different States and regions of the country, 16 U.S.C. 3834(c)(3)(C); and (6) give priority to landowners and operators subject, in his determination, to the highest degree of economic stress, 16 U.S.C. 3834(c)(3)(D). Such express grants of administrative discretion are written in broad, permissive language and reflect a legislative intent that the Secretary retain the maximum amount of flexibility in implementing and administering the Conservation Reserve Program in a manner that is responsive to varying environmental and economic conditions throughout the United States.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MAY 1991

U.S. GOVERNMENT PRINTING OFFICE: 1991 — 282-061/20533